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No. 07-526

# In the Supreme Court of the United States

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL., PETITIONERS

*v.*

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.

2. Whether the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*, prohibits the Secretary of the Interior from taking land in Rhode Island into trust on behalf of an Indian tribe.

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## BRIEF FOR THE RESPONDENTS

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-50a.

### STATEMENT

In the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), Congress authorized the Secretary of the Interior to take "in trust for [an] Indian tribe" "any interest in lands, water rights, or surface rights to lands * * * for the purpose of providing land for Indians." 25 U.S.C. 465. Pursuant to that authority, the Secretary approved the application of the Narragansett Tribe (Tribe) to have a 31-acre parcel of

land located in Charlestown, Rhode Island, taken into trust for the purpose of low-income housing. Petitioners challenged that trust acquisition, claiming that the IRA does not authorize the Secretary to take land into trust for the Tribe, because the Tribe did not receive federal recognition until after the IRA's enactment, and that the Secretary's action was contrary to the Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq.* The Interior Board of Indian Appeals (IBIA) rejected petitioners' challenges (J.A. 48a-71a), as did the district court (Pet. App. 84-136). The court of appeals, sitting en banc, affirmed (Pet. App. 1-81).

1. a. *The Indian Reorganization Act.* In 1934, Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). That "sweeping" legislation, *ibid.*, manifested a sharp change of direction in federal Indian policy. It replaced the assimilationist policy characterized by the Indian General Allotment Act (Allotment Act), ch. 119, 24 Stat. 388, which had been designed to "put an end to tribal organization" and to "dealings with Indians * * * as tribes." *United States* v. *Celestine*, 215 U.S. 278, 290 (1909).

The IRA authorized Indian tribes to adopt their own constitutions and bylaws (§ 16 (25 U.S.C. 476 (2000 & Supp. V 2005)) and to incorporate (§ 17 (25 U.S.C. 477)). It also allowed tribes to decide, by referendum, whether to exclude their reservation from the IRA's application (§ 18, 25 U.S.C. 478). In addition, the IRA authorized the Secretary to take specified steps to improve the economic and social condition of Indians, including: adopt-

ing regulations for forestry and livestock grazing on Indian units (§ 6 (25 U.S.C. 466)), making loans to Indian-chartered corporations "for the purpose of promoting * * * economic development" (§ 10 (25 U.S.C. 470)), paying expenses for Indian students at vocational schools (§ 11 (25 U.S.C. 471)), and giving preference to Indians for employment in government positions relating to Indian affairs (§ 12 (25 U.S.C. 472 (Supp. V 2005))).

In service of the broader goal of encouraging the Indian tribes "to revitalize their self-government" and to take control of their "business and economic affairs," Congress also sought to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973). The IRA thus prohibited any further allotment of reservation lands (§ 1 (25 U.S.C. 461)), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2 (25 U.S.C. 462)), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a) (25 U.S.C. 463(a))), and prohibited any transfer of restricted Indian lands, with limited exceptions, other than to the tribe or by inheritance (§ 4 (25 U.S.C. 464 (Supp. V 2005))).

Of particular relevance here, Section 5 of the IRA authorizes the Secretary of the Interior, "in his discretion," to "acquire * * * any interest in lands * * *, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The acquired lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian." *Ibid.*

Section 19 of the IRA provides that the term "tribe" "shall be construed to refer to any Indian tribe, orga-

nized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. 479. Section 19 also provides that "Indian" "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," as well as "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." *Ibid.*

The Secretary has issued regulations implementing his authority to take land into trust. 25 C.F.R. Pt. 151. Those regulations define "Tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). The regulations define "individual Indian" as *inter alia*, "[a]ny person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). Those regulations also specify the factors that guide the Secretary's evaluation of land acquisition requests, 25 C.F.R. 151.3(a), 151.10, and require notice to state and local governments of a proposed acquisition and an opportunity for comment. 25 C.F.R. 151.10, 151.11(d). The regulations also provide a 30-day period after publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), to allow for a judicial challenge.[1] When land is taken into trust under Section 5, it becomes Indian country. See 18 U.S.C. 1151; see also, *e.g.*, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 511 (1991).

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[1] After title is acquired, such a challenge would be barred by the Indian-land exception in the Quiet Title Act, 28 U.S.C. 2409a(a).

b. *Federal recognition of Indian tribes.* Historically, federal recognition of Indian tribes has been the exclusive province of the political Branches. See, *e.g.*, *United States* v. *Rickert*, 188 U.S. 432, 445 (1903); *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). Following passage of the IRA, the Interior Department considered several factors in determining whether a group was an Indian tribe eligible for the IRA's benefits. See Felix S. Cohen, *Handbook of Federal Indian Law*, 270-271 (1942) (*Cohen*). Those considerations included whether the group had treaty relations with the United States, been denominated a tribe by Act of Congress or Executive Order, had collective rights in tribal lands or funds, been treated as a tribe by other tribes, and exercised political authority. *Ibid.*

In 1978, the Secretary promulgated regulations, after notice and comment, establishing a uniform process for "acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. 83.2; see 43 Fed. Reg. 39,361 (1978); see also 59 Fed. Reg. 9280 (1994). The acknowledgment regulations require groups to establish a "substantially continuous tribal existence" and that they "have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3(a). It is not required that the group was under federal jurisdiction when the IRA was enacted in 1934. See 25 C.F.R. 83.7 (mandatory acknowledgment criteria), 83.8 (consideration of previous federal acknowledgment). Upon recognition, the tribe is "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes." 25 C.F.R. 83.12. In 1994, Congress required the Secretary to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services pro-

vided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1.

c. *Rhode Island Indian Claims Settlement Act.* The modern-day Narragansett Tribe is descended from two tribes that occupied the Rhode Island area before Europeans arrived. Memorandum from Deputy Assistant Secretary–Indian Affairs (Operations) to Assistant Secretary–Indian Affairs 1 (July 19, 1982) (*Recommendation for Acknowledgment*). In 1709, the colony of Rhode Island contracted with the Tribe to purchase some of the Tribe's land. That deed reserved to the Tribe an eight-mile square encompassing what is now Charlestown. *In re Narragansett Indians*, 40 A. 347, 355-356, 361-363 (R.I. 1898). In 1880, Rhode Island enacted legislation purporting to terminate the Tribe's sovereignty and to purchase virtually all of the Tribe's remaining lands for $5000. *Id.* at 363; *Recommendation for Acknowledgment* 4. The Tribe retained a small tract of commonly-owned land and continued to conduct annual meetings. *Ibid.* The Tribe also made several unsuccessful attempts to recover its land from Rhode Island (see, *e.g.*, *In re Narragansett Indians*, *supra*), but it did not establish a government-to-government relationship with the United States. See Pet. App. 144-147.

In 1975, the Tribe (then organized as a state-chartered corporation) sued the State of Rhode Island and private landowners, pursuant to the Non-Intercourse Act, 25 U.S.C. 177, to recover 3200 acres of its aboriginal territory. Pet. App. 10-11, 86. After multilateral negotiations, the parties settled the land claims in an agreement (J.A. 25a-38a) that was implemented by Congress in the Settlement Act. The Settlement Act provided 1800 acres of land (Settlement Lands) for the Tribe and expressly made those lands subject to the civil

and criminal law and jurisdiction of the State. 25 U.S.C. 1708(a); Pet. App. 11. In exchange, the Tribe agreed to the extinguishment of its aboriginal land claims and any claims that they had based on "any interest in or right involving" the lands previously transferred from them. 25 U.S.C. 1705(a)(3). The Act specifically anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," and provided that the Settlement Lands thereafter could not be alienated without the Secretary's approval. 25 U.S.C. 1707(c).

In 1983, the Secretary formally acknowledged the Narragansett Indian Tribe under 25 C.F.R. Pt. 83. 48 Fed. Reg. 6177 (1983). In 1988, the Secretary accepted the Settlement Lands in trust, pursuant to Section 5 of the IRA, subject to the Settlement Act's requirement (25 U.S.C. 1708(a)) that they are subject to state civil and criminal law and jurisdiction. Pet. App. 11-12, 87.

2. In 1992, the Tribe purchased the 31-acre parcel at issue here in fee. Pet. App. 4, 12. The parcel is "adjacent to the [S]ettlement [L]ands, across a town road." *Id.* at 12. In 1993, the Tribe applied to the Secretary to have that parcel taken into trust. In 1998, following a lengthy administrative process, the Department approved the Tribe's application "for the express purpose of building much needed low-income Indian Housing" through a contract with the United States Department of Housing and Urban Development. J.A. 45a-46a; see J.A 51a-52a (describing Tribe's need for land for housing). The IBIA affirmed. J.A. 48a-71a.

3. Petitioners then filed this action, challenging the trust acquisition on multiple grounds, all of which the court rejected. Pet. App. 100-135. As relevant here, the court rejected petitioners' contention that the phrase

"members of any recognized Indian tribe now under Federal jurisdiction" in the definition of "Indian" in Section 19 of the IRA restricts the Secretary's Section 5 trust-acquisition authority to tribes that were federally recognized when the IRA was enacted in 1934. *Id.* at 108-114. The court also rejected petitioners' claim that the Settlement Act precluded the Secretary from taking land outside the Settlement Lands into trust. *Id.* at 114-126.

4. Sitting en banc, the court of appeals affirmed. Pet. App. 1-81. The court unanimously held that the IRA authorized the Secretary to take land into trust for the Tribe. *Id.* at 17-37. The court concluded "from the text, context, and legislative history" that Section 19 of the IRA is "at least ambiguous as to whether the phrase 'now under federal jurisdiction' disqualifies tribes that were federally recognized after 1934." *Id.* at 28. The court further concluded that the Secretary's interpretation of his trust authority was reasonable and entitled to deference. *Id.* at 17-37.

The court also unanimously held that the Settlement Act did not preclude the Secretary from taking land into trust outside the Settlement Lands. Pet. App. 37-48; *id.* at 72 n.25 (Howard, J., dissenting); *id.* at 78 (Selya, J. dissenting). A majority of the court further concluded that the Settlement Act's provision subjecting the Settlement Lands to state civil and criminal law and jurisdiction (25 U.S.C. 1708(a)) does not extend to other lands in Rhode Island. Pet. App. 48-50. Judge Howard and Judge Selya dissented on that point. *Id.* at 71-81. In their view, the Settlement Act requires that any Indian trust land in Rhode Island remain subject to state law and jurisdiction. *Id.* at 72 & n.25; *id.* at 79.

## SUMMARY OF ARGUMENT

The en banc court of appeals properly concluded that the Secretary is authorized to take the land at issue into trust under the Indian Reorganization Act (IRA).

1. Section 5 of the IRA authorizes the Secretary of the Interior to take land into trust for an "Indian tribe or individual Indian" for the purpose of providing land for Indians. 25 U.S.C. 465. Section 19 of the IRA broadly defines "tribe" to refer to, *inter alia*, "any Indian tribe." 25 U.S.C. 479. That separate definition of "tribe" plainly extends the Secretary's trust-acquisition authority to the Narragansett Tribe, without regard to when it received federal recognition. Giving full effect to the definition of "tribe" with respect to Section 5's trust authority, as well as other provisions of the IRA, furthers the IRA's overriding purpose of revitalizing tribes as political and economic entities. At a minimum, the IRA does not foreclose that interpretation of "tribe," which is embodied in the Secretary's regulations and is entitled to deference.

Even if the IRA's separate definition of "Indian" has some bearing on the Secretary's trust-acquisition authority for a "tribe," the definition of "Indian" is expressly inclusive, with several examples of persons encompassed by that term. The IRA's text, structure, purpose, and history all point to the conclusion that Section 19's first example—which includes members of "any recognized tribe now under Federal jurisdiction"—extends to persons who meet that description at the time the IRA is applied. Congress sometimes uses "now" in that fashion, particularly where, as here, the function the word serves is to describe a class to which the statute will be applied. That understanding of "now" furthers the purposes of the IRA, and it is consistent with

Congressional intent to benefit persons who remain "Indians" under federal jurisdiction. Moreover, Congress knows how to say "at the time of the passage of this Act" and, indeed, did so in other provisions of the IRA. At the very least, the meaning of "now" in Section 19 is ambiguous. That ambiguity, as well as Congress's use of the expansive phrase "shall include" to define the term "Indian," leaves a gap for the agency to fill.

The Secretary has reasonably done so, in regulations promulgated after notice-and-comment rulemaking. Those regulations interpret Section 5's trust-acquisition authority to extend to any Indian tribe that is recognized as eligible for Indian programs, with no limitation based on the tribe's status in 1934. Those regulations are consistent with regulations implementing the Secretary's authority under other provisions of the IRA and other Indian statutes. Moreover, that interpretation is confirmed by subsequent Indian legislation, in which Congress has confirmed the Secretary's authority to recognize tribes that were not recognized in the past, and has demonstrated its understanding and intent that all federally recognized tribes are to be treated equally with respect to Indian programs and services.

2. Nothing in the text of the Rhode Island Indian Claims Settlement Act repeals the Secretary's authority under the IRA to acquire land into trust for the Narragansett Tribe or subjects such trust lands to state jurisdiction. The only language even touching on the Secretary's trust authority suggests that the authority remains intact. The Act expressly contemplates that the Secretary might subsequently recognize the Tribe, and the parties' settlement expressly acknowledged the Tribe's right to seek recognition for eligibility for Indian programs. Moreover, the only provision conferring

state jurisdiction over lands held by or for the Tribe is expressly limited to the lands provided to the Indians in the settlement. Nothing in the Act addresses the allocation of jurisdiction over lands that the Tribe might subsequently acquire. That silence is in stark contrast to other settlement acts, in which Congress has expressly resolved trust-acquisition and jurisdictional issues with respect to land outside the settlement lands. Petitioners seek to read such language into the Rhode Island act, but it is simply not there.

## ARGUMENT

### I. THE SECRETARY HAS AUTHORITY UNDER SECTION 5 OF THE INDIAN REORGANIZATION ACT TO TAKE LAND INTO TRUST FOR THE NARRAGANSETT TRIBE

The first question presented is whether the Narragansett Tribe is a tribe for which the Secretary may acquire lands in trust under the IRA, without regard to whether it was recognized and under federal jurisdiction on June 18, 1934, the date of the IRA's enactment. As explained below, Congress has not unambiguously resolved that question. The Secretary, however, has answered that precise question through notice-and-comment rulemaking: his trust-acquisition authority extends to any Indian tribe that is recognized by the Secretary as eligible for Indian programs, with no limitation based on the tribe's status in 1934. 25 C.F.R. 151.2(b) and (c)(1). The court of appeals correctly concluded that the agency's interpretation is "based on a permissible construction of the statute," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), and therefore controls.

### A. The Text, Structure, Purpose, And Legislative History Demonstrate That The IRA Applies To A Tribe That Is Federally Recognized As Of The Statute's Application

#### *1. The Secretary has authority to take land into trust for a currently recognized "tribe"*

Section 5 of the IRA authorizes the Secretary to take title to land "in trust for the Indian tribe or individual Indian for which the land is acquired," for "the purpose of providing land for Indians." 25 U.S.C. 465. As the court of appeals recognized (Pet. App. 23), the IRA "define[s] separately" the terms "tribe" and "Indian," and the definition of "tribe" is more expansive than that of "Indian." Section 19 broadly defines "tribe" to include all of the various political entities generally understood to be tribes—Indian tribes, organized bands, and pueblos—as well as Indians residing on one reservation. 25 U.S.C. 479. The "now under Federal jurisdiction" language—upon which petitioners' theory depends—appears only in the definition of "Indian," not in the separate statutory definition of "tribe."

To be sure, as petitioner Carcieri emphasizes (Br. 17), Section 5 states that the Secretary is authorized to take land into trust to "provid[e] land for Indians." 25 U.S.C. 465. But that phrase does not unambiguously import the plural of the term "Indian" as defined in section 19. The plural term "Indians" ordinarily connotes tribes as well as individual Indians. See, *e.g.*, *New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867) (State's attempt to tax Indian reservation land was "an unwarrantable interference, inconsistent with the original title of the Indians"); *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (referring to "Indians' exemption from state tax," expressly including both tribes and

individuals). Indeed, the IRA unambiguously uses "Indians" in that way in Section 1 by referring to "treat[ies] * * * with the Indians," 25 U.S.C. 461, which necessarily means tribes. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 3. And that reading of "Indians" makes particular sense in Section 5, which expressly provides that land can be taken "in trust for the Indian tribe or individual Indian." 25 U.S.C. 465.

Nor does anything in the IRA's text compel grafting the definition of "Indian" onto the definition of "tribe" in Section 19, and petitioners do not appear to contend otherwise. Congress did use the word "Indian" in its definition of the word "tribe," but, at least with respect to the groups described by "Indian tribe, organized band, [or] pueblo," it used only the adjective "Indian," not the noun. 25 U.S.C. 479. Given that Congress also used the adjective "Indian" in the definition of the word "Indian" itself—plainly using the adjective in a generic, non-technical sense, see *ibid.* (defining "Indian" using the undefined terms "Indian descent," "Indian reservation," and "Indian blood")—it would be implausible to conclude that using the adjective "Indian" to define "tribe" incorporates that term as technically defined in Section 19. Indeed, Congress also used the phrase "Indian tribe" in its definition of "Indian." *Ibid.* Congress's use of the phrase "Indian tribe" as part of its definition of "Indian," combined with its use of the phrase "Indian tribe" as part of its definition of "tribe," is "completely circular." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992). At a minimum, it demonstrates (contrary to petitioners' premise) that the IRA does not always use the word "Indian" in the technical sense defined in Section 19.

Thus, whatever the proper construction of "Indian," the separate definition of "tribe" in Section 19 extends the IRA's benefits to "any Indian tribe," regardless of when it received federal recognition. Giving full effect in that manner to the categorical definition of "tribe" as used in Section 5 and elsewhere in the IRA is consistent with the IRA's "overriding purpose" of revitalizing tribes as political and economic entities. *Mancari*, 417 U.S. at 542. At the very least, Section 19 does not *foreclose* that interpretation of "tribe," which is embodied in the Secretary's regulations. As explained below, any such ambiguity also extends to the phrase "recognized Indian tribe now under federal jurisdiction" in the definition of "Indian." And the definition of "Indian" itself is written in terms of the persons that word "include[s]," thereby allowing for inclusion of other comparably situated persons. 25 U.S.C. 479. Congress thus granted "authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

***2. The definition of "Indian" also looks to current status***

Petitioners ignore the categorical definition of "tribe" and instead rest their argument on the word "now" in the first example in the definition of "Indian": "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 479. That definition, however, does not foreclose the Secretary's trust acquisition for the Tribe.

a. When used in a statute, "now" can mean either at the time of a statute's enactment or at the time of its application. As explained in the edition of *Black's Law Dictionary* contemporaneous with passage of the IRA,

although "now" as used in a statute "ordinarily refers to the date of its taking effect," it can also refer "to a time contemporaneous with something done." *Black's Law Dictionary* 1262 (3d ed. 1933). Even petitioner Carcieri acknowledges (Br. 27) that "now" sometimes has that latter connotation. Indeed, in some contexts, the law interprets "now" in that latter sense. See 80 Am. Jur. 2d *Wills* § 1033, at 245 (2002) (courts have construed wills transferring property "now" owned as transferring "property acquired by the testator after he executes his will").

Petitioner Carcieri relies (Br. 18-19) on common dictionary definitions of "now," which include "[a]t the present time," "at the time of speaking," and "in or under the present circumstances." *Webster's New International Dictionary of the English Language* 1414 (1917). But in a statute intended to have ongoing future application, those definitions beg the relevant question: did Congress mean under the circumstances present at the time of its own action, or under the circumstances present when the statute is invoked? Considered in isolation, "now" could mean either, so the dictionary definitions do not unambiguously resolve the matter. Moreover, because there are hundreds of instances of "now" in the United States Code, the Court should decline to create any sort of artificial presumption, or inflexible rule, which could skew the interpretation of a large number of statutory provisions not before the Court.

b. The immediate context of "now" in Section 19 of the IRA, while not conclusive, suggests that Congress meant at the time of the statute's application. Section 19 includes three examples of classes of persons "include[d]" within the term "Indian." 25 U.S.C. 479. In stark contrast to the use of the fluid term "now" in the

first example, Congress used a specific date to delimit the persons included within the very next example. That example includes "all persons who are descendants of such members who were, *on June 1, 1934*, residing within the present boundaries of any Indian reservation." 25 U.S.C. 479 (emphasis added). That date is just days away from the IRA's effective date of June 18, 1934. If Congress had similarly intended the first example to refer to members of a closed class of tribes based on their status in 1934, it could simply have used a specific date, or at least expressly referred to "at the time of passage of this Act."

Indeed, elsewhere in the IRA, Congress did expressly refer to the enactment date. In Section 14, Congress used the phrase "at the time of the passage of this Act" to refer to lands then available for allotment to the Sioux Indians. 48 Stat. 987; see 25 U.S.C. 474 (replacing phrase with "on June 18, 1934"). Similarly, in Section 18, Congress required the Secretary to call special elections "within one year after the passage and approval of this Act" for Indians to exclude their reservation from the IRA's coverage. 48 Stat. 988; 25 U.S.C. 478 (replacing phrase with "within one year after June 18, 1934") (subsequently extended by a year, 49 Stat. 378). The fact that Congress did not do the same in its first description of who shall be included as an "Indian"—especially when juxtaposed against its use of a specific date in the very next example—suggests that Congress did not intend for "now" in Section 19 to mean at the time of

enactment.[2] At the very least, the text, in context, does not unambiguously require that interpretation.

c. The function the word "now" serves in the IRA further suggests that Congress intended to refer to the time of the statute's invocation. See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning against "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them") (citation omitted). Congress has sometimes used "now" to incorporate a body of legal rights or remedies, and it can be ambiguous as to whether Congress means to incorporate subsequent changes. See, *e.g.*, Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717 (offender shall "receive the same punishment as the laws of the State in which such place is situated now provide"); see *Franklin* v. *United States*, 216 U.S. 559, 568 (1910) (interpreting same); 47 U.S.C. 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute.").

Other times, as in Section 19, Congress has used "now" for the purpose of defining a class affected by the

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[2] Petitioner Carcieri asserts that it would have been "grammatically awkward for Congress to have used the term 'now' instead of the date 'June 18, 1934'" in Section 18. Br. 29 n.10. But Congress did not use the calendar date in Section 18 as enacted, 48 Stat. 988, and in any event, it could have said "within one year from now." Nor does the fact that Congress provided only a year from passage of the Act for a tribe to opt out of the IRA's coverage make it "improbable" that "now" in Section 19 means at the time of application of the Act. Carcieri Br. 29 n.10; see Charlestown Br. 25. Only those tribes that were *already* recognized and under federal jurisdiction needed to be given the option to opt out; groups that were not yet recognized effectively opt in by seeking federal recognition.

statute. While that use of "now" can refer to the time of enactment, see, *e.g.*, *Montana* v. *Kennedy*, 366 U.S. 308 (1961), it can also refer to the time of the statute's application. For example, Congress has directed that Social Security benefits be terminated when there has been improvement in the recipient's medical condition and he "is now able to engage in substantial gainful activity." Social Security Disability Reform Act of 1984, 42 U.S.C. 423(f)(1)(B)(ii). Congress plainly referred to the applicant's condition at the time of the termination decision, not the provision's enactment in 1984. See *Difford* v. *Secretary of HHS*, 910 F.2d 1316, 1320 (6th Cir. 1990). Similarly, when Congress instructed the Environmental Education Advisory Council to periodically evaluate educational organizations "now in existence," it did not mean for the Council to evaluate organizations that existed at the time of passage but later became defunct and to ignore organizations of recent origin. 20 U.S.C. 5508(d)(1)(E). And when a 1917 Act authorized the President to convey from time to time to the people of Puerto Rico "property now owned by the United States," 48 U.S.C. 748, it neither allowed the President to convey property owned by the United States in 1917 but since sold to others, nor prohibited conveyances of property acquired after 1917.

Indeed, shortly before Congress enacted the IRA, this Court read "now" in a 1906 Indian statute to refer to a time other than the date of enactment. See *United States* v. *Reily*, 290 U.S. 33 (1933). The Court held that the statute, which allowed Indians who were affiliating with Kickapoo Indians "now or hereafter nonresident in the United States" to inherit property free from alienation restrictions, did not apply to someone who met that description at some point after 1906 but no longer

did so at the time he inherited the property. *Id.* at 40. Like that statute, Section 19 appears to take into account (as Congress was presumed to be aware when it passed the IRA) that the status of a tribe or Indian may vary over time, and to provide that the current state of affairs should determine eligibility for benefits.

d. Petitioners note (Carcieri Br. 21-22) that Congress used "now" elsewhere in the IRA to refer to 1934. See 25 U.S.C. 465 (§ 5) ("now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927)"); 25 U.S.C. 468 (§ 8) ("now existing or established hereafter"); 25 U.S.C. 472 (Supp. V 2005) (§ 12) ("now or hereafter"). But the meaning of the stand-alone "now" in Section 19 cannot be extrapolated from those very different phrases. To make that leap, petitioners rely on a presumption that "now" must be given the same meaning throughout the IRA. Carcieri Br. 21-22, 28. But that "presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Cline*, 540 U.S. at 595 (citation omitted). "Now" is just "that kind of word." *Id.* at 596. "Now" is not a substantive term in the Act, and it is used in statutes to serve different purposes. Indeed, there is much less reason for a rigidly uniform meaning of "now" in the IRA than of the word "age" in a statute specifically addressing age discrimination, yet the Court declined to apply the presumption even in *Cline*.

Moreover, contrary to petitioners' contention, the fact that Congress did not add "or hereafter" to Section 19 does not "unambiguously restrict" the meaning of "Indian" to members of "tribes that were both federally recognized and under federal jurisdiction at the time

that the IRA was enacted." Carcieri Br. 22-23. To the contrary, adding "or hereafter" would have given the first example of "Indian" a meaning that is not attributed to it by either petitioners or the Secretary. The definition would then include members of federally recognized tribes under federal jurisdiction in 1934 *or* at any time since. In contrast, the Secretary's reading excludes members of tribes that may once have met that description, but no longer do. Petitioners are thus incorrect to suggest (Carcieri Br. 19-20) that the Secretary's interpretation renders "now" in Section 19—and "hereafter" in other sections, R.I. Br. 26-27—superfluous. Moreover, as explained above, "now" also serves to contrast the fluid nature of Section 19's first example of "Indian" with the closed, 1934-specific nature of the class in the second.

e. Indeed, as the court of appeals observed, "it may well be that the phrase 'now under federal jurisdiction' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" Pet. App. 25. Although reading "now" to modify the last antecedent (Carcieri Br. 33-34) might ordinarily be "sensible as a matter of grammar," that result "is not compelled" when another reading is reasonable. *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-331 (1993). Had Congress intended the word "now" to modify "recognized tribe" in the definition of "Indian," it would have made more grammatical sense to use the phrase "tribe now recognized." As the court of appeals suggested, the statute is therefore more reasonably read to limit the definition of "Indian" to those *members* of recognized tribes who personally remained under federal jurisdiction.

Congress could reasonably have so limited the IRA's benefits to individuals. Individual Indians may leave

federal jurisdiction when they abandon their tribal relations, see, *e.g.*, *In re Heff*, 197 U.S. 488, 508 (1905), overruled on other grounds, *United States* v. *Nice*, 241 U.S. 591 (1916), and tribes whose members have done so may become extinct. *Cohen* 272-273; *Miami Nation of Indians of Indiana, Inc.* v. *United States Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001), cert. denied, 534 U.S. 1129 (2002). In fact, as the court of appeals concluded (Pet. App. 23-27), the legislative history suggests that the phrase "now under federal jurisdiction" was added to Section 19 for precisely that reason: to prevent the application of the IRA to individual Indians whose relations with the United States might cease through assimilation. See pp. 23-24, *infra*.

***3. The purposes and legislative history of the IRA reinforce the conclusion that Congress intended to extend its benefits to all federally-recognized tribes***

a. The purposes of the IRA also suggest that Congress intended an understanding of "tribe" and "Indian" that focuses on the time the IRA is applied. As this Court has observed, the IRA was "sweeping" legislation, *Mancari*, 417 U.S. at 542, designed to serve as a new foundational charter for the Nation's Indian policy. Such a law should be "construed liberally in favor of the Indians," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citation omitted), in order to accomplish its purposes in light of unfolding developments, see *United States* v. *Lara*, 541 U.S. 193, 202-203 (2004)—not narrowly and technically in the manner petitioners propose.

The IRA's "overriding purpose" was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politi-

cally and economically." *Mancari*, 417 U.S. at 542. And the Act was comprehensive in scope. It "contains a number of provisions that have nothing to do with land consolidation," Pet. App. 21; see pp. 2-3, *supra,* designed to reinvigorate tribal relations, enhance the authority of tribal governments, restore the national policy of dealing with the Indians as tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe*, 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11,125 (1934) (statement of Sen. Wheeler)). While Section 5's trust-acquisition authority served in part to restore land lost to Indians as a result of the Allotment Act (Carcieri Br. 30-32), Section 5's scope was broader, in service of the overriding objectives of tribal self-government and self-determination and promotion of the Indians' welfare. Section 5, along with other land-related provisions, sought to assure that tribes—including those that never lost land under the Allotment Act—would have an adequate territorial base.

As the court of appeals concluded, given those broader objectives, "it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934." Pet. App. 21. Certainly nothing in the text unambiguously requires that result. Indeed, contrary to petitioners' suggestion (Carcieri Br. 5, 17) that the IRA's definition of "Indian" is unambiguously limited to Indians subject to the General Allotment Act of 1887, the IRA explicitly applies to pueblos, 25 U.S.C. 479, which were unaffected by the Allotment Act, see, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 245 n.17, 253 n.28 (1985).

b. As petitioners note (Carcieri Br. 33), the first definitional example in Section 19 was discussed during a congressional hearing in a colloquy between one of the Act's sponsors, Senator Wheeler, and Commissioner of Indian Affairs Collier. Senator Wheeler expressed the need for language that would, at some point in the future, exclude from the definition of "Indian" some of the persons who fell within the definition in 1934. Specifically, he observed: "I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called 'tribes' there. They are no more Indians than you or I, perhaps. * * * And yet they are under the supervision of the Government of the United States." *Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 266 (1934) (*Senate Hearing*). In response, Commissioner Collier suggested adding the phrase "now under Federal jurisdiction" in the first definitional example, immediately following "recognized Indian tribe." *Ibid.* ("Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.").

Although the import of that colloquy is not entirely clear, the phrase "now under federal jurisdiction" would have to mean something other than at the time of enactment in order to address Senator Wheeler's expressed concern—namely, "to sooner or later eliminate those Indians who are at the present time * * * under the supervision of the Government of the United States." *Senate Hearing* 266. As the court of appeals observed,

"[i]f the purpose was to exclude those who might later be dropped from federal jurisdiction, it would make more sense to measure status as of the date benefits were sought, not as of the date of enactment of the statute." Pet. App. 25. Yet petitioners' interpretation would do the reverse: it would extend the benefits of the IRA to members of tribes that were recognized and under federal jurisdiction in 1934, regardless of their tribe's current status.

Petitioners emphasize (Carcieri Br. 33) Commissioner Collier's comment that the addition "would limit the act to the Indians now under Federal jurisdiction." *Senate Hearing* 266. But that restatement of the proposed language does not make the meaning of the text any more clear than the text itself. And, needless to say, ambiguous legislative history, much less an ambiguous colloquy at a single hearing, cannot make ambiguous text plain.

#### *4. This Court's decision in* John *does not require a different result*

Petitioner Charlestown is also wrong to suggest (Br. 25-28) that the meaning of "now" in Section 19 is controlled by *United States* v. *John*, 437 U.S. 634 (1978). The Court there described the definition of "Indian" in the IRA as including "not only * * * 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' * * * but also * * * 'all other persons of one-half or more Indian blood.'" *Id.* at 650 (brackets in original) (quoting 25 U.S.C. 479). Charlestown's argument hinges solely on the Court's insertion of "[in 1934]" in its quotation of the statute.

As the court of appeals noted, however, the Court's passing editorial emendation "contains no analysis on this point" and, more importantly, was entirely unnecessary to its holding. Pet. App. 22-23. Recounting a series of congressional and Executive actions, the Court rejected the Fifth Circuit's conclusion that the federal government was precluded from holding lands in trust for the Mississippi Choctaws. *John*, 437 U.S. at 649-650. When it reached the point of "[a]ssuming for the moment that authority for the [relevant] proclamation can be found only in the [IRA]," the Court addressed whether the Mississippi Choctaws were "persons of one-half or more Indian blood," 25 U.S.C. 479, and, finding that they were, held that "the Mississippi Choctaws were not to be excepted from the general operation of the [IRA]." *John*, 437 U.S. at 650. *John* lacks any analysis of what "now" means because its meaning was irrelevant to the Court's decision.

Indeed, if anything, the fact that the Court added the bracketed reference to 1934 reinforces the conclusion that the relevant clause is ambiguous; otherwise, inserting words into the statute would have been unnecessary. Moreover, in the same discussion, the Court indicated its view that the IRA covers tribes not legally recognized at the time of the IRA. See *John*, 437 U.S. at 651 n.20 (concluding, after reviewing a 1936 Interior Solicitor's opinion, that, "although there was no legal entity known as 'the Choctaw tribe of Mississippi,' the Department of the Interior anticipated that a more formal legal entity, a tribe for the purposes of federal Indian law, soon would exist"); see also *id.* at 645-646.

In any event, regardless of what the Court meant by the insertion of "[in 1934]" in *John*'s quotation of Section 19, that glancing reference was not a "hold[ing] that its

construction follows from the unambiguous terms of the statute." *Brand X*, 545 U.S. at 982. Accordingly, it does not "foreclose [the] agency from interpreting [the] ambiguous statute" in a different way. *Ibid.*[3]

***5. In any event, Congress made the statutory definition of "Indian" expressly inclusive, leaving a gap for the agency to fill***

Even if "now" in the first definitional example in Section 19 could be construed in context to unambiguously mean "on June 18, 1934," Congress nevertheless "explicitly left a gap for the agency to fill." *Chevron*, 467 U.S. at 843. Section 19 does not purport to delineate the entire universe of persons who are "Indians" for purposes of the IRA. Instead, Section 19 provides that "[t]he term 'Indian' as used in this Act *shall include*," and then sets forth three examples. 25 U.S.C. 479 (§ 19) (emphasis added). As this Court has frequently observed, the use of the term "include" indicates that what follows is illustrative rather than exclusive. *Burgess* v. *United States*, 128 S. Ct. 1572, 1578 n.3 (2008) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation.") (quoting 2A Singer & Singer, *Statutes and Statutory Construction* § 47:7, at 305 (7th ed.

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[3] Petitioners rely on two appellate decisions involving Section 19. Carcieri Br. 26-27. The first, however, was superseded by *John* and, in any event, cannot survive under *Brand X* because it predated the Secretary's Part 151 regulations. See *United States* v. *State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974). The second case, *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005), raised a constitutional issue concerning Native Hawaiians, and simply summarily stated, after quoting Section 19 and without further textual analysis of the IRA, that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Id.* at 1280.

2007)); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978).

That was the understanding in 1934, and Congress enacted Section 19 with presumed awareness of that background understanding. See, *e.g.*, *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979). Just the year before enactment of the IRA, this Court interpreted the words "shall include," in context, as a phrase of "extension or enlargement rather than as one of limitation or enumeration." *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). The Court contrasted Congress's use of "shall include" language with its use of "shall mean" language elsewhere in the statute, concluding that only the latter meant "shall include only." *Ibid.* That same reasoning applies here, with the same result. In contrast to the inclusive definition of "Indian," Congress defined "tribe" with a more definitive "shall be construed to refer to." 25 U.S.C. 479.

### B. Because The Act Does Not Unambiguously Answer The Question, The Secretary's Reasonable Interpretation Of "Tribe" And "Indian" Is Controlling

At a minimum, the IRA—and its "now under Federal jurisdiction" language—does not unambiguously answer the question presented. The Secretary has promulgated regulations implementing Section 5 of the IRA that expressly cover trust acquisitions such as the one for the Narragansett Tribe. Because those regulations are based on a reasonable construction of the IRA, they are entitled to "controlling weight." *Chevron*, 467 U.S. at 844. Indeed, none of the petitioners makes any argument in this Court that, if Section 19 is ambiguous, the Secretary's interpretation is unreasonable.

### *1. The Secretary's construction of "tribe" and "Indian" is reasonable in light of the IRA's text, structure, purpose, and history*

Congress has expressly authorized the Executive Branch to "prescribe such regulations as [it] may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. 9; see 25 U.S.C. 1, 2. In 1980, after engaging in notice-and-comment rulemaking, 45 Fed. Reg. 62,034 (1980), the Secretary adopted regulations in 25 C.F.R. Pt. 151 that govern trust acquisitions under Section 5. Those regulations define "Tribe" to mean, *inter alia*, "any Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). They further define "Individual Indian" to mean, *inter alia*, "[a]ny person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). Neither definition is tied to recognition status in 1934. Because Congress "left a gap for the agency to fill," and because "there is an express delegation of authority" to issue regulations of this kind, the Secretary's regulations are entitled to *Chevron* deference. *Chevron*, 467 U.S. at 843-844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001).[4]

[4] In an internal memorandum to the Assistant Secretary of Indian Affairs (Oct. 1, 1980), regarding a request to take land into trust for the Stillaguamish Tribe, an Associate Solicitor opined that "the definitions of 'Indian' and 'tribe' must be read together," and that Section 19's phrase "recognized tribe now under Federal jurisdiction" "includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." *Id.* at 2. The Associate Solicitor concluded that the Stillaguamish was a tribe "under federal jurisdiction" in 1934 by virtue of its signing of an 1855 fishing-rights treaty. *Id.* at 6-8. See also Letter from Acting Secretary of the Interior

The regulations interpreting the Secretary's Section 5 authority do not distinguish between tribes based on their status when the IRA was enacted. Rather, as the court of appeals observed, eligibility turns on "a tribe's federal recognition status at the time a trust acquisition is requested." Pet. App. 31.[5] A tribe's recognition status, in turn, is a question that Congress has assigned to the Secretary in the Federally Recognized Indian Tribe List Act of 1994 (List Act). Pursuant to statutory directive, the Secretary publishes annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1. If a tribe is so recognized, it falls within the essentially identical definition of "Tribe"

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to David Getches 8 (Oct. 27, 1976) (denying initial request to take land into trust for Stillaguamish Tribe as a matter of discretion, and expressing "doubts" as to whether the Secretary's trust-acquisition authority extends to "tribes that were not administratively recognized on the date of [the IRA], (June 18, 1934)"). The suggestion that Section 19 requires that a tribe have been under federal jurisdiction in 1934 is flatly inconsistent with the trust-acquisition regulations in Part 151. The 1980 memorandum does not refer to those regulations, despite the fact that they had been published in final form two weeks before. It is those regulations, not the internal memorandum, that state binding agency policy. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742-743 (1996).

[5] That also is clear from the history of the regulations. As initially proposed in 1978, "Tribe" would have been defined as "any Indian tribe * * * which is currently recognized by the U.S. Government as eligible" for special Indian programs. 43 Fed. Reg. at 32,132. The final regulations deleted the word "currently" because it created ambiguity: some commentators had incorrectly read it to mean (as petitioners read "now" in IRA Section 19) "at the time of the regulations." 45 Fed. Reg. at 62,034.

in the Secretary's trust-acquisition regulations. 25 C.F.R. 151.2(b).

For all of the reasons explained in Part I.A., *supra*, the Secretary's interpretation of "tribe" and "Indian" for purposes of his trust-acquisition authority is consistent with the text, structure, purpose, and history of the IRA. And for "Indian," that is so whether his regulation is understood as an interpretation of the ambiguous phrase "recognized Indian tribe now under Federal jurisdiction" or as an explication expressly permitted by the gap left by the phrase "shall include."

***2. The Secretary's regulatory interpretation is consistent with the Department's prior construction of the IRA, as well as other Indian statutes***

The Secretary's prior constructions of the IRA and other Indian statutes support the reasonableness of the Secretary's construction of his trust-acquisition authority in 25 C.F.R. Pt. 151.

a. As the court of appeals observed (Pet. App. 31-32), other IRA regulations similarly define "Indian" based on circumstances at the time of application. For example, the regulations implementing the Secretary's authority under Section 16, which allows eligible Indian tribes to organize and adopt constitutions and by-laws, defines "Indian" as including "[a]ll persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 CFR 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the [IRA], as amended." 25 C.F.R. 81.1(i). An early version of the regulations implementing Section 16 defined "Indian" in similar terms that did not turn on a tribe's status as of June 18, 1934.

See 25 C.F.R. 52.1 (1966). See also 25 C.F.R. 163.1 (similar definition for Indian forestry units).

Another notable example is the employment-preference regulations under Section 12 of the IRA. In the initial version, promulgated in 1978, the Secretary defined "Indian" to mean, *inter alia*, "[m]embers of any recognized Indian tribe now under Federal Jurisdiction." 25 C.F.R. 259.1 (1978). That tracked the first example in Section 19. But by doing so *in 1978*, it reflected the Secretary's interpretation of the statutory language as referring to the time of application of the statute, not 1934. The current version continues to use that same language, including the word "now." 25 C.F.R. 5.1. Compare 42 C.F.R. 136.41 (similar definition for preference in Indian Health Service) with 42 C.F.R. 36.41 (1978) (same).

Those regulations are consistent with other regulations issued by the Secretary over the past 70 years defining "Indian" in various settings as turning on the status of a person's tribe at the time that status is being considered. In so doing, the Secretary has used the very "now" phrase that appears in Section 19 over many different years, without tying the "now" to any specific date. For example, in Law and Order Regulations issued in 1935 relating to Courts of Indian Offenses, 55 Interior Dec. 401, the Secretary defined "Indian" as "any person of Indian descent who is a member of any recognized Indian tribe *now under Federal jurisdiction*." § 1, *id.* at 401 (emphasis added). That same "now" language appeared in law-and-order regulations published in subsequent years. See, *e.g.*, 25 C.F.R. 161.2 (1938); 25 C.F.R. 161.2 (1949); 25 C.F.R. 11.2(c) (1966); see also 25 C.F.R. 11.100(d) ("Indian" defined as "a member of an Indian tribe which is recognized by the Federal Government as eligible for services from the [Bureau of Indian Af-

fairs]"). The Secretary also used that same phrase to define "Indian beneficiaries" under regulations related to health activities. See, *e.g.*, 25 C.F.R. 84.8 (1938) ("[a]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction").

b. As the court of appeals further observed (Pet. App. 35 n.10), published opinions issued by the Solicitor of the Interior interpreting the IRA also support the Secretary's regulatory definitions. For example, in 1937, the Solicitor determined whether the landless Shoshone Indians of Nevada were "Indians" within the meaning of the IRA for whom the Secretary could take land into trust under Section 5. See Op. Solic. Dep't of the Interior 706, 706 (1937) (*Solicitor's Opinions*). The Solicitor described the IRA's definition of Indian as "includ[ing] all persons of Indian descent who are members of a recognized Indian tribe now under Federal jurisdiction." *Id.* at 707 (quoting 25 U.S.C. 479). The Solicitor did not say that "now" meant the date of the IRA's enactment.[6]

Other published opinions, spanning a number of years, reflect a similar interpretation. See, *e.g.*, *Solicitor's Opinions* 668, 668 (1936) (determining that the Secretary cannot take land into trust in the name of the Choctaw Tribe of Mississippi because "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe"); *Solicitor's Opinions* 724, 727 (1937) (determining that the St. Croix Chippewa Indians were not eligible to organize under the IRA in part because, although they might once have been "recognized" as a separate band, "they now present no characteristics entitling them to recognition as a band"); *Solicitor's Opin-*

[6] In contrast, with respect to the second example in the IRA's definition, the Solicitor did note the "June 1, 1934" qualification. *Solicitor's Opinions* at 707.

*ions* 747, 748 (1937) (looking to the "most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups" in determining that the Nahma and Beaver Island Indians were not "recognized bands" within those groups); *Solicitor's Opinions* 1394, 1394 (1946) (determining that the evidence was insufficient to conclude whether the Burns Paiute Indian Community "constitute[d] a recognized band of Paiute Indians"). Nothing in those opinions suggests that whether the tribe was recognized and under federal jurisdiction as of the enactment of the IRA was determinative.

Moreover, the Solicitor's opinions demonstrate Interior's understanding that whether a group was a "tribe" within the meaning of Section 19 did not turn on whether the individuals in that group fell within one of the three examples in Section 19's definition of "Indian." Rather, that question turned on factors related to the entity as a group, such as whether it had treaty relations with the United States, been denominated a tribe by an Act of Congress or Executive Order, been treated as having collective rights in tribal lands or funds, had been treated as a tribe or band by other Indian tribes, or had exercised political authority over its members. See *Cohen* 270-271; see also, *e.g.*, *Solicitor's Opinions* 1261 (1944) (Catawba Tribe); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 502-503 (1986).

c. Regulatory practice also supports the Secretary's interpretation. As the court of appeals observed, "it is not seriously disputed that the Secretary has never *rejected* an application to take land into trust for a federally recognized tribe on the ground that the tribe was not recognized and under federal jurisdiction in 1934." Pet. App. 32. Moreover, the Secretary has taken land into

trust for tribes that were federally recognized after 1934. For example, the Secretary has acquired trust lands for the Sault Ste. Marie Tribe of Ottawa and Chippewa Indians of Michigan and the Grand Traverse Band of Chippewa Indians. See Resp. C.A. Supp. En Banc Br. App. A. Like the Narragansett, those groups were acknowledged as tribes pursuant to the administrative process established by the Part 83 regulations (*id.* at App. E at 15-16). And the Secretary has acquired trust land for the Tunica-Biloxi Indian Tribe of Louisiana, recognized in 1981. *Id.* at 16.

Similarly, pursuant to his authority in Section 16 of the IRA, the Secretary has organized tribes that were federally recognized after the statute's enactment. For example, Interior Department records show that, in addition to taking land into trust, the Secretary approved a constitution for the Sault Ste. Marie Tribe in 1975. Likewise, in 1962, the Secretary approved a constitution for the Miccosukee Tribe of Indians of Florida, which was not recognized until 1961 (Resp. C.A. Supp. En Banc Br. App. E at 15).

d. There is an internal Interior Department circular distributed in 1936 that states a view of the first example in Section 19's definition contrary to the interpretation at pp. 14-21, *supra*. That circular, issued over Commissioner Collier's signature and addressed to "Superintendents," stated that Section 19 "provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act; (2) descendants of such members residing on an Indian reservation June 1, 1934; and (3) all other persons of one-half or more Indian blood." United States Dep't of Interior, *Circular No. 3134*, *Enrollment*

*Under The IRA* (*1936 Circular*) 1 (March 7, 1936); *ibid.* (describing as "Class 1" a person of Indian descent who "belongs to a recognized tribe which was under Federal jurisdiction on the date of the Act"). The circular expressed the view that persons falling within the first class "will be carried on the rolls as members of the tribe," but that a record needed to be kept of those falling within the second and third classes. *Ibid.* The circular thus included instructions for registering persons falling within the second and third examples. *Ibid.*

That internal memorandum, which was furnished to this Office by the Department of the Interior after this Court granted certiorari in this case following a further search of the Department's records, does not outweigh, much less vitiate, the interpretations and agency practice discussed above. Moreover, even standing alone, that internal memorandum cannot defeat the reasonableness of the Secretary's current interpretation of his trust-acquisition authority for several reasons. That document expressly noted that the definition of "Indian" in the IRA "shall include" the three specified examples, *1936 Circular* 1, a formulation that allows the Secretary to classify additional persons as "Indians." See pp. 26-27, *supra*. Its description of the first example was also unnecessary to the purpose of the circular, which was to provide internal guidance for keeping a record of persons that fell within the second and third examples. See *id.* at 1-2.[7]

[7] The fact that the memorandum appears above the signature of Commissioner Collier, who suggested the phrase "now under Federal jurisdiction" during a colloquy in the legislative hearings (see pp. 23-24, *supra*), does not make the statutory language plain. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history, *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980),

Most importantly, that internal memorandum cannot defeat the deference due the Secretary's interpretation promulgated through a formal rulemaking process. *Brand X*, 545 U.S. at 981-982.[8]

***3. Subsequent Indian legislation, including amendments to the IRA itself, demonstrates the reasonableness of the Secretary's interpretation***

In the 74 years since passage of the IRA, Congress has enacted many statutes addressing Indian tribes and their status under federal law. Although Congress is presumed to be aware of the Secretary's trust-acquisition regulations, Congress has never amended the provisions at issue or otherwise expressed concern that the Secretary has misinterpreted his authority. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). Moreover, taken together, and considering the "overall statutory scheme," see, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007), Congress's enactments since passage of the IRA reinforce the reasonableness of the Secretary's in-

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and Commissioner Collier was not even a legislator who voted on the IRA.

[8] In addition, in a 1994 letter responding to a request from a Member of Congress for a list of so-called nonhistoric Indian tribes, the Acting Assistant Secretary for Indian Affairs set forth a description of Section 19 of the IRA similar to the one used by this Court in *John*. Letter from Acting Assistant Secretary—Indian Affairs to Rep. George Miler 3 (Jan. 14, 1994). That description, however, does not reflect a considered agency judgment of that particular question and, for the same reason, underscores the ambiguity inherent in the statutory language. In any event, that statement is incorrect, and was flatly inconsistent at the time with longstanding regulations promulgated after notice and comment, including the regulations in Part 81, to which the letter refers generally in the immediately preceding paragraph. See 25 C.F.R. 81.1.

terpretation of his trust-acquisition authority. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

a. In 1994, Congress amended the IRA to add two new subsections, both of which expressly articulate a principle of equality among recognized tribes. 25 U.S.C. 476(f) and (g). Subsection (f) prohibits federal agencies from promulgating "any regulation or mak[ing] any decision or determination pursuant to the [IRA] or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. 476(f). Subsection (g) provides that any such regulation or decision "shall have no force or effect." 25 U.S.C. 476(g). Those subsections expressly mandate a principle of administrative equality and non-discrimination that extends to *all* federally recognized tribes, without regard to whether they were "under Federal jurisdiction" on June 18, 1934. As one cosponsor of the amendment explained, the "amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law." See 140 Cong. Rec. 11,235 (1994) (statement of Sen. McCain).

b. The reasonableness of the Secretary's interpretation is further bolstered by the List Act, also enacted in 1994. The List Act mandates that the Secretary publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1.

The legislative findings in the List Act expressly contemplate the addition of tribes that had not previously been recognized. They note the Secretary's authority to recognize tribes pursuant to "the administrative procedures set forth in part 83 of the Code of Federal Regulations," 25 U.S.C. 479a note, as well as his responsibility to "regularly update[]" that list. *Ibid.* The findings also expressly state that Congress "has actively sought to restore recognition to tribes that previously have been terminated." *Ibid.*; 25 U.S.C. 479a-1(b) (requiring annual publication of list).

The List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when that tribe attained federal recognition. And the eligibility-for-benefits language of the List Act is substantially similar to the regulatory definition of "Tribe" adopted by the Secretary to implement his trust-acquisition authority under Section 5 of the IRA. See 25 C.F.R. 151.2(b) ("[a]ny Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"). It therefore is appropriate to presume that Congress understood that, once a tribe was recognized, it would be eligible for trust acquisitions under Section 5 of the IRA.[9]

c. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, enacted in 1988, also embodies a statutory confirmation that the Secretary's Section 5 authority extends to newly-recognized Indian tribes. Although IGRA generally bans gaming on lands acquired by the Secretary after October 17, 1988, it carves out several

[9] While Congress has sometimes expressly made the IRA applicable to particular newly-recognized and restored tribes, see Carcieri Br. 23 n.6 (citing 25 U.S.C. 1300b-14(a), 1300i-8(a)(2)), that simply serves to eliminate any doubt on the question.

exceptions. 25 U.S.C. 2719. As relevant here, IGRA allows gaming (under certain circumstances) on lands taken into trust after October 17, 1988, as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. 2719(b)(1)(B)(ii). That exception presupposes that the Secretary has authority to take land into trust for the benefit of tribes that he has first recognized after 1934. The fact that Congress legislated on that premise supports the reasonableness of the Secretary's conclusion that he has that authority. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 770 (1996).

d. Congress also has enacted special statutes extending certain benefits of the IRA—namely Section 5's trust-acquisition authority, see 25 U.S.C. 2202, as well as the IRA's restrictions on alienation (§ 2) and its incorporation provision (§ 17), see 25 U.S.C. 478-1—to "all tribes," "[n]otwithstanding section 18 of the [IRA]." *Ibid.*; 25 U.S.C. 2202. The principal purpose of those provisions, as their text makes clear, is to extend those IRA benefits even to tribes that voted under Section 18 to opt out of the IRA. It would be incongruous to give those tribes a second chance to benefit from those IRA provisions if Congress believed that those provisions did not apply to newly-recognized tribes.

Indeed, as the government adverted to and amici thoroughly briefed below, Section 2202 extends the IRA's trust-acquisition authority to "all tribes," regardless of whether they opted out of the IRA or their date of federal recognition. Resp. C.A. Supp. En Banc Br. 12; NCAI C.A. Opening Br. 16-17; NCAI C.A. En Banc Br. 15. The court of appeals did not address that issue, however, and the government did not present it in response to the petition in this Court. If this Court were to reject

the Secretary's interpretation of Section 19, a remand to decide that alternative ground would be appropriate.

## II. THE RHODE ISLAND INDIAN CLAIMS SETTLEMENT ACT NEITHER REPEALS THE SECRETARY'S TRUST AUTHORITY UNDER IRA SECTION 5 NOR SUBJECTS NEW TRUST LAND TO STATE JURISDICTION

The court of appeals correctly concluded that the Settlement Act neither repeals the Secretary's authority under the IRA to acquire land in trust for the Narragansett Tribe nor subjects any new trust land to state jurisdiction. The Settlement Act resolved then-pending lawsuits in which the Narragansett sought to void title to 3200 acres of land in Rhode Island, contending that the Tribe possessed aboriginal title to the lands and that the lands had been transferred without federal approval, in violation of the Non-Intercourse Act, 25 U.S.C. 177. See pp. 6-7, *supra*. Congress determined that settlement legislation was necessary because the claims had caused "severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town." 25 U.S.C. 1701(b).

The Settlement Act resolved that property dispute, and it closely tracked the settlement agreement (J.A. 25a-38a) between the litigating parties. The Act granted the Tribe 1800 acres of land, 25 U.S.C. 1706, 1707, denominated as the Settlement Lands. See 25 U.S.C. 1702(d), (e), and (f). In exchange, the Act cleared the titles of any other lands claimed by the Narragansett Tribe in the United States, or lands claimed by other Indians in Rhode Island (outside Charlestown), by retroactively deeming lawful all transfers of land from them. 25 U.S.C. 1705(a)(1) and 1712(a)(1). The Act further provided that that retroactive approval "shall be regarded

as an extinguishment" of any "aboriginal title" that the Indians may have held to such lands, 25 U.S.C. 1705(a)(2) and 1712(a)(2), and of "all claims" that they may have "arising subsequent to" the retroactively-approved transfers and "based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy)." 25 U.S.C. 1705(a)(3) and 1712(a)(3).

### A. The Text, Structure, Purpose, And History Of The Settlement Act Demonstrate That It Did Not Repeal Or Limit The Secretary's Trust-Acquisition Authority

1. The presumption is that when Congress intends to repeal existing statutory authority, it does so expressly. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Mancari*, 417 U.S. at 549-550. As the court of appeals concluded, however, "[t]here is simply nothing in the text of the Settlement Act * * * that accomplishes * * * a repeal or curtailment of the Secretary's trust authority." Pet. App. 37. Indeed, "[n]o language * * * even references[] the Secretary's power under the IRA to take lands into trust." *Id.* at 38. And the only language that even bears on that authority suggests that the Secretary's trust authority is preserved.

The Settlement Act expressly contemplates that the Secretary might "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," 25 U.S.C. 1707(c), which was not federally recognized when the Settlement Act was passed. Indeed, the terms of settlement agreement expressly provided that the Tribe would "have the same right to petition for recognition and services as other groups." J.A. 29a.

Congress was presumably aware that, if the Secretary did take land into trust for the Narragansett, that

land could be "Indian country," over which the United States and the Tribe would have jurisdiction. 18 U.S.C. 1151; see, *e.g.*, *Citizen Band Potawatomi Tribe*, 498 U.S. at 511 (citing, *inter alia*, *John*, 437 U.S. at 648-649). Nothing in the Settlement Act purports to prevent the operation of that established jurisdictional rule if the Secretary were to take land into trust. The only provisions of the Settlement Act that speak to jurisdiction expressly apply only to the 1800 acres of Settlement Lands. Section 9, which is entitled, in part, "Applicability of State Law," provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. 1708(a); see 25 U.S.C. 1702(d), (e), and (f) (defining "settlement lands"); 25 U.S.C. 1706(a)(3) (addressing fishing and hunting on settlement lands). The court of appeals correctly rejected petitioners' attempt to read that provision as applying "to all lands the Tribe might ever acquire, either directly or as the beneficiary of a trust," because "that is not what the section says." Pet. App. 38.

If Congress had intended the meaning sought by petitioners, it could have said so. As the court of appeals observed, "[i]t would have been easy to extend the provisions of section 1708(a) preserving state sovereignty to cover all lands in Rhode Island owned by or held in trust for the Tribe." Pet. App. 47. Or the Settlement Act could have placed restrictions on the Secretary's trust authority in 25 U.S.C. 1707(c), where Congress contemplated that the Secretary might subsequently recognize the Tribe and placed restrictions on conveyance of the Settlement Lands if he did. Or, as both the court of appeals and the IBIA noted, "paragraph 15 of the [settlement agreement] would have been 'a logical place for the parties to set out any restrictions' on the Secretary's

trust authority following federal recognition of the Tribe." Pet. App. 47 (quoting J.A. 62a). But not only does the settlement agreement not contain such restrictions, it expressly contemplates that, if recognized, the Tribe would be eligible for the same federal benefits as other tribes. J.A. 29a.

2. Contrary to petitioners' contention (Carcieri Br. 40), the text and structure of the Settlement Act make clear that the extinguishment provisions settle only claims based on past land transactions, and do not speak to any future land acquisitions.

The Tribe purchased the land at issue here in fee simple from a private developer, more than a decade after the Settlement Act. Pet. App. 12. The Tribe's new title thus obviously was not based on any claim extinguished by the Settlement Act. Nothing in the Act prohibits the Tribe from purchasing land on the open market, and petitioners do not contend otherwise. See Carcieri Br. 40. Nor does the Tribe seek to assert sovereignty over the parcel based on any prior aboriginal title or any claim extinguished by the Settlement Act.

Rather, the Tribe simply pursued the "proper avenue" for tribes "to reestablish sovereign authority over territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005). In *City of Sherrill*, the Court described Section 5 of the IRA as the "mechanism" that Congress provided "for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." *Id.* at 220. The Court observed that the Secretary's regulations implementing Section 5 "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory," including "[j]urisdictional problems and potential conflicts of

land use which may arise." *Id.* at 220-221 (quoting 25 C.F.R. 151.10(f)).

The fact that the Tribe once had sovereignty over the parcel here by virtue of aboriginal title, which has been extinguished by the Settlement Act, does not foreclose the Secretary from taking the land into trust, with the usual jurisdictional consequences. To be sure, the extinguishment of the Tribe's aboriginal title would preclude it from claiming that its fee purchase *unilaterally* reestablished sovereignty. See *City of Sherrill*, 544 U.S. at 202-203. But, as the court of appeals concluded, "[h]owever aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty." Pet. App. 42. Indeed, nothing in Section 5 attaches any significance to the presence or absence of prior tribal sovereignty over the land. See 25 U.S.C. 465 (authorizing trust acquisitions "within or without existing reservations"), 467 (allowing Secretary to proclaim new reservations on acquired land).

The State relies on the Settlement Act's extinguishment of "all claims . . . arising subsequent to the transfer and based upon any interest in or right involving such land," and contends that the "extinguishment of future land-acquisition claims necessarily extends to seeking Secretarial action under 25 U.S.C. § 465." R.I. Br. 40-41 (emphasis omitted) (quoting 25 U.S.C. 1705(a)(3), 1712(a)(3)). As an initial matter, the claims to which the quoted text refers are not any claims arising subsequent to the Settlement Act, but claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers. 25 U.S.C. 1705(a)(1) and (3); 25 U.S.C. 1712(a)(1) and (3); see H.R. Rep. No. 1453, 95th Cong., 2d Sess. 12 (1978) ("Such approval of these prior conveyances will also clear * * * title back

to the transfers being approved."). In any event, neither the Secretary nor the Tribe is asserting any "claim" at all. Rather, the Secretary has exercised authority expressly conferred by the IRA, and the Tribe has been accorded a benefit available to all recognized Indian tribes at the Secretary's discretion. The Act's extinguishment provisions therefore have no application here.

3. That conclusion is confirmed by the purpose and history of the Settlement Act. As reflected in the legislative findings, 25 U.S.C. 1701, and in the congressional reports, the purpose of the Act was "to implement a settlement agreement" among the Tribe, the State, and private landowners "concerning the Tribe's claim to certain lands within the town of Charlestown and for damages for trespass on such lands." S. Rep. No. 972, 95th Cong., 2d Sess. 5 (1978). The committee reports reflect an intent to "eliminat[e] any cloud on the title to claimed lands while assuring that the Tribe is adequately compensated for extinguishment of its claims to the lands." *Ibid.*; accord H.R. Rep. No. 1453, *supra*, at 5. Thus, while the Settlement Act does reflect an intent "to resolve once and for all the claims being asserted" by the Tribe "on the ground that past transfers of those lands may have been made in violation of the Indian Nonintercourse Act," *id.* at 15 (quoting letter from Interior Solicitor Krulitz), it was not designed to be a comprehensive resolution of all the issues that might arise if the Secretary recognized the Tribe in the future.

### B. A Comparison To Other Settlement Acts Makes Clear That The Rhode Island Act Does Not Impose The Restrictions Petitioners Assert

1. In stark contrast to the provisions at issue here, Congress has demonstrated in other settlement acts that it knows how to preclude the future exercise of authority under IRA Section 5 and to impose special jurisdictional rules when it wants to do so.

As the court of appeals observed (Pet. App. 47-48), the Maine Indian Claims Settlement Act, 25 U.S.C. 1721 *et seq.*, which Congress passed only two years after the Rhode Island statute, contained just such explicit language. That act stated: "Except for the provisions of this [Act], the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. 1724(e) (Supp. V 2005). It further specified the boundaries within which the United States could acquire land in trust and provided that land "acquired outside the boundaries * * * shall be held in fee by the respective tribe or nation." 25 U.S.C. 1724(d).

Also unlike the Settlement Act here, the Maine statute included language expressly addressing the allocation of criminal, civil, and regulatory jurisdiction throughout the State, not just on settlement lands. In particular, it provided generally that any lands owned by, or held in trust by the United States for, any Indians other than the Passamaquoddy Tribe or Penobscot Nation "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State." 25 U.S.C. 1725(a). The Maine act further provided that the land owned by, or held in trust for, the Passamaquoddy Tribe

and the Penobscot Nation would be "subject to the jurisdiction of the State of Maine to the extent and in the manner provided by" a state statute, 25 U.S.C. 1725(b)(1), and authorized those tribes "to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine to the extent authorized" by state law. 25 U.S.C. 1725(f). See 25 U.S.C. 1725(e)(1) (granting consent to amend state statute's allocation of jurisdiction with tribe's consent).

Similarly, the Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. 1751 *et seq.*, included an express (albeit less sweeping) limitation on the Secretary's trust authority outside the boundaries of settlement lands in Connecticut. That statute expressly provided that lands acquired using the statutory settlement fund and "located within the settlement lands shall be held in trust by the United States," 25 U.S.C. 1754(b)(7), but that lands acquired with that fund "located outside of the settlement lands shall be held in fee" by the tribe, and that "the United States shall have no further trust responsibility with respect to such land." 25 U.S.C. 1754(b)(8). That provision precludes the Secretary from taking into trust land outside the settlement lands that are purchased using the settlement fund. See *Connecticut ex rel. Blumenthal* v. *United States Dep't of the Interior*, 228 F.3d 82, 88 (2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001).

Also, unlike here, Congress elsewhere has made clear that state jurisdiction applies to lands subsequently acquired by or held in trust for the tribe. In the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, 25 U.S.C. 1771 *et seq.*, Congress expressly provided that "the settlement lands *and any other land that may now or hereafter be owned by or*

*held in trust* for any Indian tribe or entity in the town of Gay Head, Massachusetts shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts." 25 U.S.C. 1771g (emphasis added). Petitioners attempt to read such language into the Settlement Act here, but the Act contains no such text.[10]

Significantly, the Maine, Connecticut, and Massachusetts settlement acts all contain extinguishment provisions—similar to the ones on which petitioners rely here—that extinguish the Indians' aboriginal title to previously transferred land and "all claims" they may have had "arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy." 25 U.S.C. 1723(b) and (c) (Maine); see 25 U.S.C. 1753(b) and (c) (Connecticut; similar); 25 U.S.C. 1771b(b) and (c) (Massachusetts; similar). Given the express provisions in those acts separately addressing the Secretary's future trust authority and jurisdictional alloca-

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[10] In the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773 *et seq.*, Congress also expressly addressed both future trust acquisitions and jurisdiction over those lands. That statute provides that "the Secretary shall exercise the authority provided him in section 465 of this title, and shall apply the standards set forth in [25 C.F.R. Pt. 151]" to any such acquisitions. 25 U.S.C. 1773c. It further provides that "[t]he Tribe shall retain and exercise jurisdiction, and the United States and the State and political subdivisions thereof shall retain and exercise jurisdiction, as provided in the Settlement Agreement and Technical Documents and, where not provided therein, as otherwise provided by Federal law." 25 U.S.C. 1773g. That statute confirms that the Secretary's trust-acquisition authority was already "provided [to] him in section 465," and demonstrates that when Congress intends to adopt special jurisdictional rules, it does so expressly.

tions over subsequently-acquired lands, Congress plainly did not understand the provisions extinguishing property claims to have the effect suggested by petitioners.

2. Contrary to petitioners' contention (Carcieri Br. 45-47), nothing in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, suggests that the very different provisions of the Rhode Island Act foreclose the Secretary from exercising his authority under IRA Section 5. Although the House Report states that the Settlement Act "follows the precedent set in [ANSCA] by providing the Indians with an opportunity to acquire a viable land base in the process of resolving their claims to aboriginal lands," H.R. Rep. No. 1453, *supra*, at 8, the statutes diverge in significant respects relevant here.

As the court of appeals observed (Pet. App. 45 n.15), ANCSA virtually eliminated all reservations in Alaska and transferred both funds and land, without restraints on alienation, to business corporations wholly owned by Alaska Natives that were to be formed pursuant to ANCSA. See, *e.g.*, 43 U.S.C. 1601, 1605, 1606, 1607, 1618; 43 U.S.C. 1613, 1617 (2000 & Supp. V. 2005); *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-534 (1998). In contrast, the Rhode Island act *created* a land base for the then-landless Narragansett. Although the Narragansett had been organized as a state-chartered corporation known as the "Narragansett Tribe of Indians," 25 U.S.C. 1702(a), the Settlement Act placed the management of their land for the time being in the hands of a separate corporation with a board having both tribal and state representatives. 25 U.S.C. 1706. And, in sharp contrast to ANCSA, the Settlement Act explicitly contemplated that the Settlement Lands could be conveyed to the Tribe "if the Secretary subse-

quently acknowledged" it, and would then be subject to a federal restraint on alienation. 25 U.S.C. 1707(c). Thus, unlike ANCSA, the Settlement Act facilitated the return to, rather than the elimination of, federal superintendence of the Tribe's lands.

Moreover, although congressional staff members apparently proposed claims-extinguishment provisions here that were modeled on ANSCA, and which would have provided for extinguishment as of the Settlement Act's enactment date, H.R. Rep. No. 1453, *supra*, at 9, nothing about the use of those provisions as a model suggests that the Settlement Act would have had the sweeping effect petitioners assert. Indeed, the staff proposal was subsequently modified after Interior urged that the statute "provide for both extinguishment and ratification as of the time that the original transfers occurred." *Id.* at 15 (citation omitted). Interior sought to ensure that the statute would "not form the basis for a claim of a taking as of the date of enactment," *ibid.*, and, based on litigation involving ANSCA, to ensure that it would "eliminate any possible trespass or related claims." *Id.* at 16. Those concerns demonstrate that the provisions were addressed solely to extinguishing property claims based on prior invalid transfers, not to limiting the Secretary's distinct authority under the IRA or addressing the jurisdictional consequences of the Secretary's exercise of that authority on behalf of a recognized tribe.

Petitioner Carcieri's argument also rests (Br. 45) on the erroneous premise that ANCSA prohibited trust acquisitions in Alaska. The 1993 Solicitor's Opinion petitioner cites in support of that argument refers to an Associate Solicitor's opinion from 1978 that stated that it would be an abuse of discretion to take land into trust for Native Villages in Alaska in light of the distinctive fea-

tures of ANCSA. That 1978 opinion (which has been rescinded, 66 Fed. Reg. 3452, 3454 (2001)) did not conclude that the terms of ANCSA prohibited trust acquisition. To date, the Secretary has chosen in his discretion not to exercise such authority. See 25 C.F.R. 151.1 (explaining that regulations do not cover trust acquisition in Alaska). His decision not to do so is currently being challenged. *Akiachak Native Cmty.* v. *United States Dep't of Interior*, No. 1:06-cv-00969 (D.D.C. filed May 24, 2006). In any event, that distinct statutory issue is irrelevant here: petitioners have not renewed their claims in this Court that the Secretary abused his discretion in deciding to take this land into trust.

3. At bottom, petitioners argue that the Settlement Act impliedly repealed the Secretary's Section 5 trust authority. But, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *TVA*, 437 U.S. at 190 (citation omitted). The Secretary's trust authority in the IRA can readily co-exist with the Settlement Act, and both should therefore be given effect. See *Connecticut*, 228 F.3d at 90 (concluding the same concerning Connecticut settlement act).

### C. Any Doubt Should Be Resolved In Favor Of Preserving The Secretary's Trust Authority

Although the Settlement Act does not contain any ambiguity suggesting that the IRA has been rendered inapplicable, if the Court concludes otherwise, it should give due deference to the agency's interpretation of the Settlement Act, as reflected in the IBIA's well-reasoned decision (J.A. 55a-62a). See *Mead*, 533 U.S. at 229-231. Furthermore, if there is any doubt, the statute should

"be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima*, 502 U.S. at 269 (citation omitted). This Court has consistently cautioned against concluding, in the face of silence, that a congressional enactment divests privileges attendant to tribal status. See, *e.g.*, *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987). "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978).

Those principles should apply with particular force here. In 1996, Congress added a new subsection to the Settlement Act's section governing state jurisdiction, to provide that the Settlement Lands should not be treated as "Indian lands" for purposes of the IGRA. 25 U.S.C. 1708(b). By that time, the Secretary had taken the Settlement Lands into trust over the Town's objection, see *Town of Charlestown*, 18 I.B.I.A. 67 (1989), and the Tribe had applied to have the parcel at issue here taken into trust. Despite the explicit provisions in the intervening Maine, Connecticut, and Massachusetts acts addressing the Secretary's trust authority, Congress did not otherwise amend the Act.

The court of appeals' reading does not vitiate the bargain struck by the parties. The State and the private landowners obtained the relief they sought: the clearing of clouds on title to 3200 acres of land. See 25 U.S.C. 1701. The State also retained civil and criminal jurisdiction over the land provided to the Tribe in return for the Tribe's accession to the validity of those titles. But, unlike other States, Rhode Island did not secure any provision repealing the Secretary's ability to take land into

trust for the Tribe or subjecting any such land to state jurisdiction.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## STATUTORY APPENDIX

1. The Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, provides:

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project

heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,* That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the

loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of

equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the

expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian

Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of theAct of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person

shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the Unite States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the Powers conferred incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

2. 25 U.S.C. 2 provides:

**Duties of Commissioner**

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

3. 25 U.S.C. 9 provides:

**Regulations by President**

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

4. 25 U.S.C. 465 provides:

**Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption**

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one

fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

5. 25 U.S.C. 472 (Supp. V 2005) provides:

**Standards for Indians appointed to Indian Office**

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

6. 25 U.S.C. 476 (2000 & Supp. V 2005) provides:

**Organization of Indian tribes; constitution and bylaws and amendment thereof; special election**

**(a) Adoption; effective date**

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

**(b) Revocation**

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

**(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings**

(1) The Secretary shall call and hold an election as required by subsection (a) of this section—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

**(d) Approval or disapproval by Secretary; enforcement**

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this

section may be brought in the appropriate Federal district court.

**(e) Vested rights and powers; advisement of presubmitted budget estimates**

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

**(f) Privileges and immunities of Indian tribes; prohibition on new regulations**

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

**(g) Privileges and immunities of Indian tribes; existing regulations**

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

**(h) Tribal sovereignty**

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

7. 25 U.S.C. 477 provides:

**Incorporation of Indian tribes; charter; ratification by election**

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own,

hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

8. 25 U.S.C. 478 provides:

**Acceptance optional**

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

9. 25 U.S.C. 478-1 provides:

**Mandatory application of sections 462 and 477**

Notwithstanding section 478 of this title, sections 462 and 477 of this title shall apply to—

(1) all Indian tribes,

(2) all lands held in trust by the United States for Indians, and

(3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

10. 25 U.S.C. 479 provides:

**Definitions**

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

11. 25 U.S.C. 479a provides:

**Definitions**

For the purposes of this title:[1]

(1) The term "Secretary"means the Secretary of the Interior.

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[1] [This title, referred to in introductory provisions, is Pub. L. 103-455, Title I, § 101 *et seq*., Nov. 2, 1994, 108 Stat. 4791, which enacted this section, section 479a0-1 of this title]

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

12. 25 U.S.C. 479a-1 provides:

**Publication of list of recognized tribes**

**(a) Publication of list**

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

**(b) Frequency of publication**

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

13. 25 U.S.C. 1701 provides:

**Congressional findings and declaration of policy**

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

14. 25 U.S.C. 1702 provides:

**Definitions**

For the purposes of this subchapter, the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006

(D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

15. 25 U.S.C. 1703 provides:

**Rhode Island Indian Claims Settlement Fund; establishment**

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

16. 25 U.S.C. 1704 provides

**Option agreements to purchase private settlement lands**

**(a) Acceptance of option agreement assignments; reasonableness of terms and conditions**

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided*, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its sub-

mission, the Secretary will be deemed to have accepted the assignment of the option.

**(b) Amount of payment**

Payment for any option entered into pursuant to subsection (a) of this section shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

**(c) Limitation on option fees**

The total amount of the option fees paid pursuant to subsection (b) of this section shall not exceed $175,000.

**(d) Application of option fee**

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

**(e) Retention of option payment**

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

17. 25 U.S.C. 1705 provides:

**Publication of findings**

**(a) Prerequisites; consequences**

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which

the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

**(b) Maintenance of action; remedy**

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one

hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

18. 25 U.S.C. 1706 provides:

**Findings by Secretary**

Section 1705 of this title shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

19. 25 U.S.C. 1707 provides:

**Purchase and transfer of private settlement lands**

**(a) Determination by Secretary; assignment of settlement lands to State Corporation**

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

**(b) Moneys remaining in fund**

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

**(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes**

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corpo-

ration or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

20. 25 U.S.C. 1708 provides:

**Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act**

**(a) In general**

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

**(b) Treatment of settlement lands under Indian Gaming Regulatory Act**

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

21. 25 U.S.C. 1709 provides:

**Preservation of Federal benefits**

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669-669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777-777(k)).

22. 25 U.S.C. 1710 provides:

**Authorization of appropriations**

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

23. 25 U.S.C. 1711 provides:

**Limitation of actions; jurisdiction**

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

24. 25 U.S.C. 1712 provides:

**Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island**

**(a) Scope of applicability**

Except as provided in subsection (b) of this section—

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

**(b) Exceptions**

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

25. 25 U.S.C. 1715 provides:

**Exemption from taxation**

**(a) General exemption**

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

**(b) Income-producing activities**

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

**(c) Payments in lieu of taxes**

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

26. 25 U.S.C. 1716 provides:

**Deferral of capital gains**

For purposes of title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of title 26.

27. 25 U.S.C. 2201 (2000 & Supp. V 2005) provides:

**Definitions**

For the purpose of this chapter—

(1) "Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2) "Indian" means—

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian

tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.[1]

* * * * *

(4) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.[1]

28. 25 U.S.C. 2202 provides:

**Other applicable provisions**

The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law

[1] So in original. The period probably should be a semicolon.

which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

29. 25 U.S.C. 2719 provides:

**Gaming on lands acquired after October 17, 1988**

**(a) Prohibition on lands acquired in trust by Secretary**

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

**(b) Exceptions**

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres

of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

**(c) Authority of Secretary not affected**

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

**(d) Application of title 26**

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is

in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

30. 25 C.F.R. Pt. 5 provides in pertinent part:

**Preference in Employment**

**§ 5.1 Definitions.**

For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; and

(e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

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31. 25 C.F.R. Pt. 81 provides, in pertinent part:

**Tribal Reorganization Under A Federal Statute**

**§ 81.1 Definintions.**

As used in this part:

* * * * *

(i) *Indian* means: (1) All persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 CFR 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the Act of June 18, 1934, 43 Stat. 984, as amended; and (2) any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood.

* * * * *

(w) *Tribe* means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the FEDERAL REGISTER pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs; and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes.

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32. 25 C.F.R. Pt. 83 provides, in pertinent part:

**Procedures for Establishing that an American Indian group exists as an Indian Tribe**

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**§ 83.2 Purpose.**

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

**§ 83.3 Scope.**

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the

Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7(a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

* * * * *

**§ 83.12 Implementation of decisions.**

(a) Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

(b) Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of

those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

(c) While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledged tribe.

(d) Within six months after acknowledgment, the appropriate Area Office shall consult with the newly acknowledged tribe and develop, in cooperation with the tribe, a determination of needs and a recommended budget. These shall be forwarded to the Assistant Secretary. The recommended budget will then be considered along with other recommendations by the Assistant Secretary in the usual budget request process.

33. 25 C.F.R. Pt. 151 provides in pertinent part:

**Land Acquistions**

**§ 151.1 Purpose and scope.**

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and

tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members.

**§ 151.2 Definitions.**

(a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land or land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *Restricted land or land in restricted status* means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

**§ 151.3 Land acquistion policy.**

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

**§ 151.4 Acquisitions in trust of lands owned in fee by an Indian.**

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

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**§ 151.10 On-reservation acquisitions.**

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

**§ 151.11 Off-reservation acquisitions.**

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

**§ 151.12 Action on requests.**

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of

that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

34. 25 C.F.R. Pt. 163 provides in pertinent part:

**General Forestry Regulations**

**§ 163.1 Definitions.**

* * * * *

*Indian* means a member of an Indian tribe.

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*Indian forest land* means Indian land, including commercial, non-commercial, productive and non-productive timberland and woodland, that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover, regardless of whether a formal inspection and land classification action has been taken.

* * * * *

*Indian tribe* or *tribe* means any Indian tribe, band, nation, rancheria, Pueblo or other organized group or

community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and shall mean, where appropriate, the recognized tribal government of such tribe's reservation.

* * * * *

35. 42 C.F.R. 136.41 provides:

**Definitions.**

For purposes of making appointments to vacancies in all positions in the Indian Health Service, a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; or

(e) Until January 4, 1990, or until the Osage Tribe has formally organized, whichever comes first, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.